

The Honorable Robert S Lasnik
Noting Date: 4/5/2013

**UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

<p>James McDonald</p> <p>v.</p> <p>OneWest Bank, FSB, Northwest Trustee Services, Mortgage Electronic Registration Systems,</p>	<p>Plaintiff</p> <p>Defendants.</p>	<p>No. C10-1952-RSL</p> <p>Plaintiff's Response to Defendant OneWest's Motion to Schedule Expert Discovery & Countermotion to Compel Discovery Regarding Authenticity of the Note</p>
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Comes now Plaintiff James McDonald, through the undersigned counsel and respectfully submits this Response to OneWest's Motion to Schedule Expert Discovery and Countermotion to Compel Discovery Regarding Authenticity of the Note.

I. RELEVANT FACTS

On March 7, 2013, this Court issued Order Continuing Trial Date and Reopening Discovery (Dkt. #237). The scope of the Order allows for an extension of the discovery process only to allow Plaintiff to “test defendants’ claim that the note presented to the Court on January 31, 2013, is the original promissory note that plaintiff signed in January 2007.” The Court ordered Plaintiff’s expert to provide an opinion regarding the authenticity of the note and provide a report consistent with FRCP 26(a)(2)(B) on or before June 3, 2013, and that the Defendants may, if they choose, depose the Plaintiff’s expert(s) prior to June 27, 2013 (Dkt.# 237).

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1 Plaintiff counsel has been in communication with Julie Vacura, Esq., and Heidi
 2 Buck Morrison, Esq., to schedule brief depositions of those witnesses who provided
 3 testimony or sworn declarations concerning the authenticity of the note numerous times
 4 but has been met with objections from both. *The following is a list of the deponents*
 5 *proposed by Plaintiff and opposed by defendants:*

6 Suchan Murray, Authorized Signatory for OneWest, who executed Appointment of
 7 Successor Trustee dated 01/27/2010, containing this declaration: “The undersigned
 8 beneficiary warrants and represents that, as of the date this Appointment of Successor
 9 Trustee has been executed and acknowledged, **it is the owner and holder** of the
 10 obligation secured by the subject deed of trust and is not holding the same as security
 11 for a different obligation.”

13 Erica Johnson–Seck, Vice President of OneWest, who executed the Beneficiary
 14 Declaration dated 01/27/2010, under penalty of perjury, containing this Declaration:
 15 “OneWest Bank, FSB, is the actual holder of the promissory note or other obligation
 16 evidencing the above-referenced loan or has the requisite authority under RCW 62A.3-
 17 301 to enforce said obligation. The Trustee may rely upon the truth and accuracy of the
 18 averments made in this declaration.”

19 Rebecca Marks, who certified the Responses to Plaintiff’s Request for Discovery,
 20 including how OneWest has provided copies of “all endorsements and conveyances of
 21 the promissory note in question, properly executed with transfers made to the proper
 22

1 entities in proper sequence, so as to show a complete chain of title to the note from the
 2 original lender to the current owner and holder of the note.”

3 Plaintiff has requested to inquire of the following witnesses as to the factual
 4 knowledge supporting their references to “true and correct copy of the original note”
 5 being attached to motions, responses, replies, or declarations, and assertions regarding
 6 the note’s whereabouts:

7 Heidi Buck Morrison, Esq., who has made assertions repeatedly about the
 8 authenticity of the purported note and its origin throughout this litigation. Ms. Buck-
 9 Morrison was in actual possession of the note at one time and would be able to testify
 10 to the circumstances in which her law firm requested and received the note from the
 11 source as well as the identification of the source. The documents signed by Ms. Buck-
 12 Morrison are numerous: Dkt.#49, Dkt. #75; Dkt. #124; Dkt. #133; Response to Second
 13 Request to Produce; and OneWest’s Response to Interrogatories.

15 Plaintiff is mindful of the Court’s initial concern that an officer of the court should
 16 not be compelled to testify. However, Ms. Buck-Morrison has made absolute and
 17 repeated assertions concerning the manner in which the Note has been transferred and
 18 has been in actual possession of the Note and has knowledge and information bearing
 19 on the fact in issue. Ms. Heidi Buck-Morrison met with Plaintiff on July 13, 201, and
 20 represented to him that the document he was inspecting is the original note. Plaintiff should be
 21 able to inquire into the factual basis of Ms. Buck-Morrison’s statement as made to him.

22 Melissa Williams-Romeo, whose name appears on the Motion for Relief from Stay
 23 dated August 30, 2010, Bankruptcy Court Case No. 10-18496, and who certified that
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1 OneWest is the creditor of the Plaintiff's loan, and that the Note attached to the Motion,
 2 together with Chamagne Williams' Declaration "establish that Creditor is the holder of
 3 note indorsed in blank and is thus entitled to enforce the Note and foreclose on the deed
 4 of trust."

5 Mark Moburg, who signed the motion for Melissa Williams Romeo.

6 **II. Legal Authority and Arguments**

7 The defendants have never wavered from their representation that OneWest has been in
 8 possession of the *original* note. The defendants alone possess the knowledge and factual
 9 information as to the origin and transfer of the document within their control. In addition to
 10 numerous written declarations attesting to said fact, at the evidentiary hearing of January 31,
 11 2013, defendants have submitted testimony by Mr. Charles Boyle and Mr. Christopher
 12 Corcoran on the chain of transfer of the one and only original note, Ms. Julie Vacura, counsel
 13 for the defendants, handed up to the Court the document and represented to the Court that the
 14 document in her possession on behalf of OneWest, is the one and only original. There is
 15 nothing more that the defendants could say about the authenticity of this document. Where the
 16 witnesses have testified and vouched for the document's genuineness, there is no need for any
 17 "expert" vouching.

18 The discovery being sought by the Plaintiff narrowly focuses on the factual basis of the
 19 witnesses' claimed knowledge of the note's authenticity and chain of transfer. The discovery is
 20 necessary because Plaintiff never knew where the original note went after he signed it at
 21 closing. He has no means to independently verify the chain of transfer alleged by the
 22 defendants. Had it not been for the defendants' submission of the two varying versions of the
 23 note, Plaintiff would never be able to convince the Court that the original note offered by the
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1 defendants is in fact not the original. Therefore, Plaintiff's need to have the purported original
 2 tested by a third party is a genuine while the defense's proposal of expert to counter Plaintiff's
 3 expert is merely a ruse consistent with the recalcitrant behavior exhibited in the case
 4 concerning discovery. Defense counsel may inquire of Dr. James Kelley as thoroughly as they
 5 wish and challenge him on his findings, but the Court never intended, and the Order does not
 6 allow, for the defendants to engage in a prolonged and costly "battle of the experts".

7 Plaintiff requests the Court to compel the defendants to comply with the Court's Order of
 8 March 7, 2013. In this case, discovery cut-off was extended several times and closed on July
 9 27, 2012. Plaintiff requested for the note to be examined well before the Court issued the
 10 subject Order but the defendants failed to cooperate. The subject Order was then issued with a
 11 companion order for sanctions. Not much more can be done to change the defendants' ongoing
 12 disregard for the rules of law and court orders but case-dispositive sanction.

13 The Ninth Circuit has fashioned a five-part test to determine whether a case-dispositive
 14 sanction under FRCP 37 (b)(2) is warranted: (1) the public's interest in expeditious resolution
 15 of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party
 16 seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5)
 17 the availability of less drastic sanctions. "The sub-parts of the fifth factor are whether the court
 18 has considered lesser sanctions, whether it tried them, and whether it warned the recalcitrant
 19 party about the possibility of case-dispositive sanctions. This "test" is not mechanical. It
 20 provides the district court with a way to think about what to do, not a set of conditions
 21 precedent for sanctions or a script that the district court must follow. Like most elaborate
 22 multifactor tests, the test has not been what it appears to be, a mechanical means of
 23 determining what discovery sanction is just. The list of factors amounts to a way for a district

1 judge to think about what to do, not a series of conditions precedent before the judge can do
2 anything, and not a script for making what the district judge does appeal-proof.” *Conn. Gen.*
3 *Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091 (9th Cir. 2007). The most
4 important factor for the Court to consider is “whether a party’s discovery violations make it
5 impossible for a court to be confident that the parties will ever have access to the true facts”
6 and that the disputes can be resolved justly. FRCP 1; *Valley Eng’rs v. Electric Eng’g Co.*, 158
7 F.3d 1051, 1059 (9th Cir. 1998). The truth-seeking objective of discovery must be honored
8 because “[T]here is no point to a lawsuit, if it merely applies law to lies.” Id.

III. Conclusion

10 Based on the foregoing arguments supported by citations to fact and prevailing legal
11 authority, Plaintiff respectfully prays the Court to deny the Defendants Motion for Expert
12 Discovery and Compel the defendants to cooperate in the remaining discovery requests set
13 forth herein. Plaintiff respectfully urges the Court to contemplate a case-dispositive sanction in
14 the event the defendants fail to explain the basis of their objection to Plaintiff's request for
15 discovery.

16 DATED this 1st day of April, 2013.

/s/ Ha Thu Dao

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CERTIFICATION OF SERVICE

I hereby certify on April 1, 2013, the foregoing document has been caused to be served via First Class Mail Priority Mail, Messenger Service Facsimile Electronic Mail ECF, upon the following parties:

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DATED this 1st day of April, 2013.

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